IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ELECTRONICALLY
FILED
Mar 02 2017
U.S. DISTRICT COURT
Northern District of WV

LINDA TUCKER,

Plaintiff,

v. **Civil Action No.** 1:17-CV-33
Judge Keeley

CITY OF MORGANTOWN, WEST VIRGINIA; JENNIFER SELIN; NANCY GANZ; WILLIAM KAWECKI; and MARTI SHAMBERGER,

Defendants.

COMPLAINT

Comes now the Plaintiff, Linda Tucker, through her counsel, Sean W. Cook of Meyer Ford & Glasser, PLLC, and brings her Complaint against the above-named Defendants, and in further support, avers as follows:

INTRODUCTION

1. "There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For government employees are often in the best position to know what ails the agencies for which they work. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *Lane v. Franks*, 134 S. Ct. 2369, 2377 (U.S. 2014).

2. The Plaintiff, Linda Tucker ("Ms. Tucker"), brings her instant claims for the retaliation and hostile work environment she suffered as a result of exercising her First

Amendment free speech rights under the United States Constitution. These claims are brought under the authority 42 U.S.C. § 1983.

3. Ms. Tucker has served loyally as the City Clerk for the City of Morgantown, West Virginia for approximately twenty-four (24) years. In February of 2016, Ms. Tucker provided testimony at a judicial trial seeking the removal of the four council members named above as individual defendants from the Morgantown City Council. This removal petition was filed by a citizen of Morgantown, and alleged that these Defendants engaged in misconduct, malfeasance in office, incompetence and neglect of duty.

4. Subsequent to her testimony, Ms. Tucker experienced a systematic pattern of retaliation at the hands of the Defendants. Said retaliation included, but certainly was not limited to, baseless and exceedingly negative job performance evaluations.

5. Furthermore, after her testimony, Ms. Tucker was subjected to a hostile work environment rife with harassment and unwarranted scrutiny. This hostility continues to this day.

6. By her instant lawsuit, Ms. Tucker seeks money damages, as well as equitable relief, in that she requests this Court enter an Order directing that the Defendants immediately cease and desist from retaliation and abuse against her.

THE PARTIES

7. Ms. Tucker is a citizen of Monongalia County, West Virginia. Ms. Tucker is employed as the City Clerk of Defendant City of Morgantown, West Virginia, a position

to which she is appointed by, and in which she answers directly and reports to, the Morgantown City Council.

8. Defendant City of Morgantown, West Virginia (sometimes "City" or "Morgantown") is a municipality located in Monongalia County, West Virginia, and a political subdivision of the State of West Virginia. As explained below, the immunity provisions of West Virginia Code § 29-12A-1, *et seq.* do not apply to this matter. Alternatively, should a contrary conclusion be reached by the Court, Ms. Tucker avers that to the extent that the State of West Virginia may be responsible for any monetary judgment or recovery in this matter, recovery is only sought up to the limits of liability coverage of any applicable insurance policy.

9. Defendants Jennifer Selin, Nancy Ganz, William Kawecki, and Marti Shamberger (sometimes, collectively "individual Defendants"), at all times relevant, were and remain members of the Morgantown City Council. These four individual Defendants make up a four-member majority voting bloc on the Morgantown City Council. For purposes of Ms. Tucker's constitutional claims brought pursuant to 42 U.S.C. § 1983, these individual Defendants are named in their individual capacity for her claims for money damages, and in their official capacities for her claims for equitable relief.

JURISDICTION AND VENUE

10. This Court possesses subject matter and federal question jurisdiction over the Plaintiff's claims for violations of the United States Constitution brought pursuant to 42 U.S.C. § 1983.

11. Venue is proper before this Court because the acts and conduct complained of occurred in Monongalia County, West Virginia, which is located within the United States Northern Federal District of West Virginia.

THE FACTS

12. On October 8, 2015, Morgantown citizen George Papandreas ("Mr. Papandreas") filed a civil petition in Monongalia County Circuit Court pursuant to W. Va. Code § 6-6-7 (sometimes, "removal petition"), to remove from office the following four members of the Morgantown City Council: Jennifer Selin, Nancy Ganz, William Kawecki and Marti Shamberger.

13. The removal petition alleged three instances of misconduct: (i) an improper email sent on March 22, 2015, to over two-hundred (200) recipients, including over fifty (50) public employees, by Councilman Kawecki in which he solicited campaign contributions or volunteers for himself and/or the Morgantown Together Political Action Committee (of which all four council members whose removal was sought were members) without including a disclaimer for public employees to disregard; (ii) improper interference with efforts to redistrict Wards Four and Seven in the City of Morgantown; and (iii) improper interference with the administration of the City, in violation of the City of Morgantown Charter, by contacting City employees directly regarding various aspects of City operations.

14. On November 2, 2015, an order was entered by the Monongalia County Circuit Court, finding that the removal petition conformed to the requirements of West Virginia

Code § 6-6-7(b), and requested the appointment of a three-judge panel (the "Panel") to preside over the matter and the trial concerning removal (sometimes, "removal trial"). This request was granted by then Chief Justice Margaret L. Workman of the West Virginia Supreme Court.

15. On February 19, 2016, the removal trial commenced before the Panel.

16. Pursuant to a subpoena, Ms. Tucker was called by counsel for Mr. Papandreas as a fact witness.

17. At the removal trial, Ms. Tucker testified truthfully as to the improprieties alleged against the four Morgantown City Council members who are individual Defendants in this matter. The following are examples of her testimony:

18. Ms. Tucker testified that the email sent by Defendant Kawecki to City employees requesting financial and volunteer support for his and the other three individual Defendants' reelection was a violation of the City Charter and/or West Virginia law.

19. Ms. Tucker testified that upon informing Defendant Kawecki that his email violated the City Charter, he nor any of his three fellow Defendants in the current matter took any measures to correct this violation, and did not inform the recipients that the email was improper and that City employees should disregard it.

20. Ms. Tucker testified that the four individual Defendants violated the City Charter by interfering with City administration, in that they made direct contact and requests for services to City employees who were not under their direct command.

21. Ms. Tucker was asked about allegations surrounding the City's Wards and Boundaries Commission (sometimes, "Commission"). In this regard, Ms. Tucker testified as follows:

- The Commission is charged by the City Charter with developing recommendations where qualified voters are proportioned contiguously among the City Council voting districts;
- The recommendations of the Commission in advance of the 2015 election resulted in a nine (9) voter variation, and were in compliance with the contiguous voter requirements;
- The Commission's recommendations resulted in a scenario in which Defendant Selin and Defendant Ganz would run against each other for reelection;
- Defendants Selin and Ganz were the most vocal opponents of the Commission's recommendations;
- The four individual Defendants improperly sought to interfere with the activity of the Commission and influence the Commission's recommendations;
- The four individual Defendants attended Commission meetings and voiced their opposition and/or opinions regarding the Commission's recommendations;
- Commission members expressed to Ms. Tucker their opinion that the four individual Defendants were attempting to improperly influence the Commission's decisions and recommendations;

- The four individual Defendants, by a 4-3 council vote, rejected the Commission's recommendations, and replaced the Commission's Ward and Boundary districting plan with their own, which contained a three-hundred twenty-seven (327) person variation in qualified voters amongst the districts; and
- The districting plan passed by the four individual Defendants was politically expedient for their own interests, but not practicable nor consistent with the City Charter.

22. By its Order of June 10, 2016, the Panel concluded that the facts were not in dispute - including those testified to by Ms. Tucker - but that Mr. Papandreas "failed to prove that the acts rise to the level to justify removing from office officials who have been duly elected by the electorate."

23. The Panel's decision was appealed to the West Virginia Supreme Court, which explained that removal from public office was a "drastic remedy" that warranted "strict construction," and therefore, upheld the Panel's decision that the acts complained of did not rise to the level of removal from public office.

24. Ms. Tucker further testified as follows at the removal trial: "Many people from the community have brought complaints about [the four individual Defendants'] misconduct, and that this council needs to do better and be fairer. The community needs to have better people serving this community."

25. Finally, Ms. Tucker responded as follows to a question posed by counsel for Mr. Papanderas: "Q. [A]re you concerned that the City Council would take some action against you because you're here to offer truthful testimony? A. Yes."

26. Ms. Tucker's concerns proved to be valid.

27. Subsequent to her testimony, the Defendants aided and abetted one another by engaging in a systematic pattern of retaliation against Ms. Tucker, and her work environment became toxic and exceedingly hostile.

28. The Defendants also consistently chastised and harassed Ms. Tucker subsequent to her testimony, including, without limitation, at City Council and other public meetings.

29. As merely one example, at a Ward and Boundary Commission meeting in November 2016, Defendant Ganz became enraged and began screaming at Ms. Tucker. Defendant Ganz's behavior compelled Ms. Tucker to call the police out of fear for her safety, and also motivated another Councilmember to publicly apologize to Ms. Tucker at a subsequent City Council meeting for being placed into a position where she felt compelled to call the police.

30. Defendant Ganz appeared on a local radio program after the above-referenced November 2016 meeting, and was asked about the incident. In response, Defendant Ganz publicly accused Ms. Tucker of mischaracterization of the events and of leaking the police report to the media. However, Ms. Tucker did not speak to the media regarding the incident occurring at the November 2016 meeting, and the Host of the local radio program indicated that he had obtained the publicly available police report himself.

31. Furthermore, when asked if Ms. Tucker was lying about the incident, Defendant Ganz opaquely responded: "Call my attorney and ask him."

32. Finally, Defendant Ganz remarked on public radio that the situation with Ms. Tucker was a personnel matter, and that City Council was dealing with it.

33. Sadly, these comments by Defendant Ganz were not the first that she had made with regard to her retaliatory intentions towards Ms. Tucker.

34. For example, during a break at a pre-trial hearing held before the removal trial, at which the individual Defendants' motion to dismiss was presented, Defendant Ganz was overheard commenting as follows: "If we get this dismissed, Linda [Tucker] is going to get a pink slip in her Christmas card."

35. Subsequent to the removal trial, Defendant Ganz also remarked to a City employee: "What are we going to do about these people who testified?"

36. Ms. Tucker has suffered additional retaliation and harassment at the hands of the Defendants that is not as blatantly obvious as that described above.

37. Subsequent to her testimony, Ms. Tucker has been subjected by the Defendants to constant and unwarranted criticisms. She has been ostracized from employment duties that she has faithfully performed in her long service as City Clerk. Such retaliation and harassment has occurred at public City Council meetings, but has also infected her workplace at Morgantown City Hall on a daily basis.

38. Ms. Tucker's employment evaluation for the year 2016 was conducted in early 2017 (sometimes, "2016 evaluation").

39. By and through this evaluation, it appears the Defendants "dealt with" Ms. Tucker as previously promised by Defendant Ganz.

40. Ms. Tucker recently received her 2016 Evaluation. The evaluation is based on a scale of one (1) as the lowest score and seven (7) as the highest score. On information and belief, the average score assigned by the four individual Defendants was 2.9875. To the contrary, the average score assigned by the other three City Council members was 6.8.

41. These evaluation scores for 2016 were far below those Ms. Tucker had received in the many years she previously had served as City Clerk.

42. But more significant than mere numbered scores, Ms. Tucker's 2016 Evaluation contained overwhelmingly negative comments, some of which demonstrate a blatant retaliatory theme. These comments include, without limitation, the following:

- Does not exercise good judgment or fairness in treatment of certain council members;
- Reports mistakes of some [council members] to higher authorities;
- Favors some opinions in Ward and Boundaries [over others]; and
- Made an inaccurate report to police about incident and then misrepresented incident to media.

43. Furthermore, Ms. Tucker suffers from Parkinson's disease. The stress caused by the retaliation and harassment she has suffered at the hands of the Defendants has led to

the exasperation of this disease, and has caused Ms. Tucker additional and severe emotional distress.

44. As Ms. Tucker explained during her testimony at the removal trial, because of her health condition and advanced age, seeking alternative employment is not a viable option for her.

45. As such, Ms. Tucker continues to endure the retaliation and harassment of the Defendants on a daily basis.

MS. TUCKER'S PROTECTED FIRST AMENDMENT SPEECH

46. The testimony provided by Ms. Tucker under oath at the removal trial was speech protected by the First Amendment.

47. In providing her testimony, Ms. Tucker had an independent obligation to provide sworn testimony as a citizen, and her testimony was outside the scope of her ordinary job duties and independent of her obligations as a public employee.

48. Indeed, sworn testimony provided in judicial proceedings is the quintessential example of citizen speech protected by the First Amendment, for the basic reason that any citizen who testifies in such a forum bears an affirmative obligation to the court and the public to tell the truth.

49. Furthermore, the content, form and context of Ms. Tucker's testimony was that of clear public concern.

50. More specifically, Ms. Tucker's testimony regarding the allegations of misconduct, malfeasance in office, incompetence and neglect of duty on behalf of the

four Morgantown City Council members and current individual Defendants concerns issues that squarely implicate the interests of the public.

51. Moreover, when balancing the First Amendment rights of Ms. Tucker with the City of Morgantown's interest in providing effective public services, there does not exist a countervailing interest of the City to control the operation of its workplace by interfering with Ms. Tucker's rights.

52. The facts demonstrate that the current situation was not an ordinary workplace dispute. Instead, Ms. Tucker was speaking out as a citizen regarding government misconduct, and her speech warrants protection under the First Amendment.

COUNT I
RETALIATION
(In Violation of the First Amendment of the United States Constitution)

53. The allegations in the preceding paragraphs are realleged and incorporated herein.

54. The First Amendment of the United States Constitution protects public employees such as Ms. Tucker from retaliation for exercising their right to free and protected speech.

55. The Defendants subjected Ms. Tucker to a campaign of harassment and ridicule in retaliation for exercising her First Amendment rights. Such harassment was in the form of insupportable reprimands, verbal harassment, overwhelmingly negative evaluations and comments regarding her employment performance, and public condemnation.

56. In can be reasonably inferred that Ms. Tucker's testimony was a substantial motivating factor for the retaliation and numerous adverse employment actions that she was subjected to, some of which are detailed throughout this Complaint.

57. As such, the Defendants retaliated against Ms. Tucker on a basis that infringed on her constitutionally protected interests - specifically her interest in freedom of speech.

58. Accordingly, the Defendants penalized and inhibited Ms. Tucker from exercising freedoms through her constitutionally protected speech. Such interference with Ms. Tucker's constitutional rights is impermissible, and produces a result which the Defendants could not command directly.

59. As the result of this unlawful conduct perpetrated against her by the Defendants, Ms. Tucker has suffered damages, some of which are articulated below.

COUNT II
HOSTILE WORK ENVIRONMENT
(In Violation of the First Amendment of the United States Constitution)

60. The allegations in the preceding paragraphs are realleged and incorporated herein.

61. The First Amendment of the United States Constitution protects public employees such as Ms. Tucker from discrimination for exercising their right to free and protected speech.

62. Subsequent to her testimony at the removal trial, the Defendants subjected Ms. Tucker to ridicule, intimidation and insult that included, without limitation, insupportable reprimands, verbal harassment, overwhelmingly negative evaluations and comments regarding her employment performance, and public condemnation.

63. Such conduct on behalf of the Defendants represents discrimination, in that it created a hostile and abusive work environment for Ms. Tucker.

64. The Defendants' conduct in creating a hostile and abusive work environment was severe and pervasive enough to alter the conditions of Ms. Tucker's employment, and any reasonable person would perceive it as the same.

65. In can be reasonably inferred that Ms. Tucker's testimony was a substantial motivating factor for the discrimination and numerous adverse employment actions that she was subjected to, some of which are detailed throughout this Complaint.

66. As such, the Defendants discriminated against Ms. Tucker on a basis that infringed on her constitutionally protected interests - specifically her interest in freedom of speech.

67. As the result of this unlawful conduct perpetrated against her by the Defendants, Ms. Tucker has suffered damages, some of which are articulated below.

POTENTIAL IMMUNITY CLAIMS AND DEFENSES

68. In *Hutchison v. City of Huntington*, Justice Cleckley explained "that in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff." 479 S.E.2d 649, 659 (W. Va. 1996). However, the Court in *Hutchinson* qualified this requirement, and further explained that "[a] plaintiff is not required to anticipate the defense of immunity in the complaint." *Id.*

69. Nonetheless, Ms. Tucker provides as follows in anticipation of the Defendants raising the immunity defenses addressed below.

MUNCIPAL LIABILITY OF DEFENDANT CITY OF MORGANTOWN

70. Defendant City of Morgantown is directly liable to Ms. Tucker for the retaliation and harassment she suffered as the result of her testimony.

71. This liability is derived from evidence that such retaliation and harassment was and remains a policy and/or custom of the City of Morgantown. In addition to the repeated discriminatory conduct that Ms. Tucker has endured, the following are additional examples:

i. At least two other employees of the City of Morgantown testified at the removal trial that they feared retaliation in employment as the result of providing their testimony, and on information and belief, one of these employees did indeed experience the retaliation he feared; and

ii. Subsequent to the removal trial, Defendant Ganz remarked to an employee: "What are we going to do about these people who testified?"

72. The individual Defendants are members of the City Council possessing final authority to establish municipal policy on behalf of the City of Morgantown, and thus are municipal policy and decision makers for purposes of this analysis.

73. As members of the City Council representing a majority voting bloc, the individual Defendants participated in and/or condoned the actions detailed herein that violated Ms. Tucker's First Amendment rights.

74. Accordingly, the actions of the individual defendants represent a policy or custom existing in the affairs of the City of Morgantown, and municipal liability is appropriate.

QUALIFIED IMMUNITY OF THE INDIVIDUAL DEFENDANTS

75. To the extent that the individual Defendants invoke the protection of qualified immunity, such protection is not available in the present case.

76. At the time of the events supporting Ms. Tucker's allegations, it was clearly established that it was unlawful to retaliate and/or discriminate against a government employee such as Ms. Tucker for providing testimony under oath, as she did in this matter.

77. Such law was clearly established by, for example, the United States Supreme Court's decision of *Lane v. Franks*, 134 S. Ct. 2369 (U.S. 2014), that is referenced above, in which the Court held as follows: "[W]e turn to the question presented: whether the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities. We hold that it does." *Id*. at 2377.

78. As such, any reasonable city official in the position of the individual Defendants would have understood that the retaliatory and discriminatory actions towards Ms. Tucker violated her First Amendment rights, and the preexisting law clearly established the unlawfulness of such actions.

79. As such, the individual Defendants are not entitled to the protections of qualified immunity.

STATUTORY IMMUNITY FOR ALL DEFENDANTS

80. To the extent that the Defendants may seek immunity under the provisions of the West Virginia Governmental Tort Claims and Insurance Reform Act (the "Act") found in W. Va. Code § 29-12A-1, *et seq.*, such immunity is unavailable.

81. "In statutory immunity cases, the starting point for interpretive analysis is always the language of the statute itself." *Hutchison*, 479 S.E.2d at 660.

82. "This article does not apply to, and shall not be construed to apply to, the following: (b) Civil actions by an employee, or the collective bargaining representative of an employee, against his or her political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision; [and] (e) Civil claims based upon alleged violations of the constitution or statutes of the United States [.]"

83. Ms. Tucker's claims against the Defendants are for violations of the United States Constitution that arise out of her employment relationship with the Defendant City of Morgantown.

84. As such, the Act does not provide immunity to the Defendants in this matter.

PRAYER FOR RELIEF

WHEREFORE, Ms. Tucker requests judgment in her favor, and prays that the Court provide the following relief against the Defendants:

(a) Monetary damages in amounts to be established at trial, including, without limitation, damages for exasperation of her Parkinson's disease; past, present and future physical and emotional pain and suffering; ongoing and severe mental anguish; past, present and future healthcare expenses; loss of past, present and future enjoyment of life; future lost earnings and earning capacity; and any and all compensatory, consequential, treble, incidental, exemplary, economic, non-economic and other monetary damages she has suffered, in amounts to be determined by jury;

(b) Equitable relief to be determined at trial including, *inter alia*, an order that that the Defendants cease and desist from retaliating and discriminating against her;

(c) Pre- and post-judgment interest;

(d) Costs of litigation, and attorney fees incurred in prosecuting this matter, per the authority of 42 U.S.C. § 1983; and

(e) Such other and further relief as the Court deems just and proper.

A JURY TRIAL IS DEMANDED ON ISSUES SO TRIABLE

Respectfully submitted,

LINDA TUCKER,

Plaintiff,

By counsel,

_/s/ Sean W. Cook________________

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